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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
November 21, 2005
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DAVID BRIAN DERRINGER, Debtor.	BAP Nos. NM-05-077 NM-05-097
DAVID BRIAN DERRINGER, Appellant, v. MICK CHAPEL and JENNIFER CHAPEL, Appellees.	Bankr. No. 13-04-17330-MA Chapter 13
MICK CHAPEL and JENNIFER CHAPEL, Appellants, v. DAVID BRIAN DERRINGER, Appellee.	ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before CLARK, BOHANON, and MICHAEL, Bankruptcy Judges.[1]

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] The parties did not request oral argument, and after examining the briefs (continued...)

MICHAEL, Bankruptcy Judge.

The battle between the parties to these appeals has continued unabated for over ten years. The present skirmish deals with a period of three days. The bankruptcy court found that Mick Chapel and Jennifer Chapel (the "Chapels"), and their attorney, Joseph Manges ("Manges"), violated the provisions of 11 U.S.C. § 362 by sending a notice of foreclosure sale to David Brian Derringer ("Derringer") seven days after the bankruptcy court entered an order vacating the automatic stay for the benefit of the Chapels. The bankruptcy court ordered the Chapels to pay actual damages of $250.00, and ordered Manges to pay actual damages of $250.00 and punitive damages of $750.00. Derringer appeals, arguing that the damage award is inappropriately low. The Chapels and Manges cross-appeal, arguing that an award of damages is not supported by either the law or the record. Upon review, we find that the evidentiary record before us does not support an award of damages. Accordingly, we vacate the award of damages, and remand the matter for further proceedings consistent with this order and judgment.

I. Background

These cases mark the fifth and sixth appeals that Derringer and/or the Chapels have presented to this Court. A detailed history of the dispute between Derringer and the Chapels is not necessary to an understanding of our decision today, and we will not burden the reader with a detailed recital of the history of this feud.[2] We limit our recital of facts to those that are relevant to our decision

[1] (...continued)
and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of these appeals. Fed. R. Bankr. P. 8012. The cases are therefore ordered submitted without oral argument.

[2] A detailed history of the dispute between these parties is contained in *In re* (continued...)

today.

The Chapels hold a judgment lien upon certain real property owned by Derringer. On October 6, 2004, Derringer filed a petition for relief under Chapter 13 of the Bankruptcy Code. On October 29, 2004, the Chapels filed a motion for relief from the automatic stay. The motion for relief was granted in part and denied in part by an order entered on December 27, 2004 (the "December 27 Order").[3] The December 27 Order imposed certain duties and conditions upon Derringer, and stated that if such conditions were not complied with, the automatic stay would be summarily vacated. The December 27 Order was appealed to this Court by Derringer, but that appeal was dismissed as interlocutory.

On June 28, 2005, the bankruptcy court entered an order terminating the automatic stay as it applied to the Chapels (the "Order Granting Relief").[4] The Order Granting Relief made no mention of Federal Rule of Bankruptcy Procedure 4001(a)(3), which provides that such orders are automatically stayed for a period of ten days, "unless the court orders otherwise."[5] Seven days later, on July 5, 2005, Manges mailed a document entitled "Notice of Foreclosure Sale" (the "Notice") to Derringer. The Notice was filed with the New Mexico State Court on July 8, 2005.[6] Pursuant to the terms of the Notice, a sale of the Derringer property was to be held on August 11, 2005.

On July 13, 2005, Derringer filed with the bankruptcy court a pleading

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[2] (...continued)
Derringer, No. NM-05-020, 2005 WL 2216327 (10th Cir. BAP Sept. 6, 2005).

[3] Appellees' App. at 103-11.

[4] Appellees' App. at 14-16.

[5] *See* Fed. R. Bankr. P. 4001(a)(3).

[6] Appellees' App. at 40.

entitled "Debtor David Derringer's Motion For Order to Show Cause and For Extreme Actual and Punitive Damages Against Mick Chapel, Jennifer Chapel, Joseph Manges, [and] Stephen Long for Violations of Title 11 Section 362(a) Under Provisions of Title 11 Section 362(h); and Request for Relief" (the "Sanctions Motion"). In addition to reasserting virtually every argument previously made regarding the dispute between the parties, Derringer claimed that the service of the Notice less than ten days after the entry of the Order Granting Relief constituted a violation of the automatic stay provisions found in 11 U.S.C. § 362.[7] Derringer sought an award of actual and punitive damages against all parties listed in the caption of the Sanctions Motion.

The bankruptcy court held a hearing on the Sanctions Motion on August 10, 2005, one day prior to the scheduled sale of the Derringer property.[8] While the parties were provided with an opportunity to present argument, no evidence was offered or received at the hearing. The parties agreed and the bankruptcy court found that the Notice was sent to Derringer less than ten days after the entry of the Order Granting Relief. The bankruptcy court found that the Chapels and Manges had acted in violation of 11 U.S.C. § 362. The bankruptcy court then entered an order (the "Sanctions Order") requiring the Chapels to pay Derringer actual damages of $250.00, and further directing Manges to pay actual damages of $250.00 and punitive damages of $750.00.

Derringer filed his notice of appeal from the Sanctions Order on August 17, 2005.[9] On August 18, 2005, the Chapels and Manges filed a motion seeking

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[7] *See In re Banks*, 253 B.R. 25 (Bankr. E.D. Mich. 2000) (violation of the ten-day stay imposed by Fed. R. Bankr. P. 4001(a)(3) constitutes a violation of § 362).

[8] Appellees' App. at 84-86.

[9] Appellant's App. at 1.

reconsideration of the Sanctions Motion.[10] On September 20, 2005, the bankruptcy court entered an order that considered the arguments outlined in the motion to reconsider, and rejected the same.[11] On September 23, 2005, the Chapels and Manges filed their cross-appeal with respect to the Sanctions Order.

II. Appellate Jurisdiction

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[12] A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[13] In this case, the order of the bankruptcy court entered sanctions against the Chapels and Manges. Nothing remains for the trial court's consideration. Thus, the decision of the bankruptcy court is final for purposes of review.

Derringer asks us to strike the cross appeal filed by the Chapels and Manges, on the basis that the cross appeal was filed more than ten days after Derringer filed his notice of appeal. Derringer filed his notice of appeal on August 17, 2005, which was within ten days of the issuance of the Sanctions Order. One day later, also within ten days after the issuance of the Sanctions Order, the Chapels and Manges asked the bankruptcy court to reconsider the Sanctions Order. The bankruptcy court entered its order denying the motion to reconsider on September 20, 2005. The cross appeal was filed three days later.

Pursuant to Bankruptcy Rule 8002(a), a notice of appeal is timely if it is

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[10] Appellees' App. at 45-54.

[11] Appellees' App. at 88-93.

[12] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-1.

[13] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

filed "within 10 days of the date of the of the entry of the judgment, order, or decree appealed from."[14] Bankruptcy Rule 8002(b) provides that if a party makes a motion for additional findings of fact, asks the bankruptcy court to alter or amend the judgment, asks for a new trial, or seeks relief from the judgment or order, the time for appeal shall begin to run from the date that the bankruptcy court disposes of said motion.[15] The rule goes on to provide that a notice of appeal filed before the bankruptcy court rules on such a motion is not effective until the bankruptcy court disposes of the motion.[16]

The motion to reconsider filed by the Chapels and Manges was filed pursuant to Bankruptcy Rule 9023, which is one of the rules expressly identified in Bankruptcy Rule 8002(b). The cross appeal was filed three days after the bankruptcy court denied the motion to reconsider. Thus, the cross appeal is timely, as is Derringer's notice of appeal. The parties have not elected to have the appeals heard by the United States District Court for the District of New Mexico.[17] Accordingly, the Bankruptcy Appellate Panel has jurisdiction over these appeals.

III. Standard of Review

This Court has previously held that:

> "Whether a party's actions have violated the automatic stay is a question of law which is reviewed *de novo*." *Barnett v. Edwards (In re Edwards)*, 214 B.R. 613, 618 (9th Cir. BAP 1997) (citations omitted). We review the bankruptcy court's finding that a creditor's action constituted a willful violation of the stay for clear error. *McHenry v. Key Bank (In re McHenry)*, 179 B.R. 165, 167 (9th Cir. BAP 1995); *Franchise Tax Bd. v. Roberts (In re Roberts)*, 175 B.R. 339, 343 (9th Cir. BAP 1994). An award of sanctions for a violation of the automatic stay is reviewed for an abuse of discretion.

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14 Fed. R. Bankr. P. 8002(a).

15 Fed. R. Bankr. P. 8002(b).

16 *Id.*

17 28 U.S.C. § 158(c); Fed. R. Bankr. P. 8001(e).

Edwards, 214 B.R. at 618.

> Under the abuse of discretion standard, a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. When we apply the "abuse of discretion" standard, we defer to the trial court's judgment because of its first-hand ability to view the witness or evidence and assess credibility and probative value.

United States v. Ortiz, 804 F.2d 1161, 1164 n.2 (10th Cir. 1986); *see also Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting and applying this standard); *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991) (same). An abuse of discretion may occur if a court bases its ruling on a view of the law that is erroneous. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).[18]

We see no basis to depart from the standard of review outlined in *Diviney*.

IV. Discussion

We now turn to the issues raised by the Chapels and Manges. Their first claim is that the bankruptcy court erred in entering the Sanctions Order because the sending of the Notice did not violate the automatic stay. The Chapels and Manges cite several cases that have held that the postponement of a foreclosure sale is not an act that violates 11 U.S.C. § 362.[19] We note that this issue was neither framed before nor argued to the bankruptcy court.[20] We will not in this case consider for the first time on appeal an argument that was not presented to

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[18] *Diviney v. NationsBank (In re Diviney)*, 225 B.R. 762, 769 (10th Cir. BAP 1998).

[19] *See, e.g., First Nat'l Bank v. Roach (In re Roach)*, 660 F.2d 1316, 1318 (9th Cir. 1981); *Taylor v. Slick*, 178 F.3d 698, 701 (3rd Cir. 1999); *Zeoli v. RIHT Mortgage Corp.*, 148 B.R. 698, 700-01 (D.N.H. 1993); *United Mutual Sav. Bank v. Doud (In re Doud)*, 30 B.R. 731, 733-34 (Bankr. W.D. Wash. 1983).

[20] *See* Appellees' App. at 39 (response to Sanctions Motion that merely states that the motion "fail[s] to state a claim upon which relief may be granted and the motion should be denied as a matter of law."); Appellees' App. at 45-54 (motion to reconsider the Sanctions Order, which makes no mention of this argument); and Appellees' App. at 84-86 (transcript of August 10, 2005, hearing where no mention of this argument is made).

the court below.[21] We leave it to the discretion of the bankruptcy court whether it wishes to consider this argument upon remand of this matter.

The second issue raised by the Chapels and Manges relates to the dearth of evidence to support the award of monetary sanctions against them. It is settled law that "actual damage in the form of some out of pocket loss or expense must be proven with reasonable certainty and that it [a damage award under § 362(h)] cannot be speculative or based upon conjecture."[22] Moreover, the burden of proof to establish such damages lies with the party seeking damages.[23] Even in cases where the automatic stay has been violated, an award of punitive damages is not justified unless evidence of "'egregious, intentional misconduct on the violator's part'" has been shown.[24] In the present case, the bankruptcy court received no evidence on the issue of damages. While it appears that the bankruptcy court may have based its award upon certain allegations of expenses made by Derringer in the Sanctions Motion, there is simply no record upon which the bankruptcy court could have based its decision. Without a sufficient factual basis, the bankruptcy court may not award damages. We have no choice but to vacate the damage award, and remand this matter for an evidentiary hearing on the issue of damages.

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[21] *See McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 999 (10th Cir. 2002) ("It is clear in this circuit that absent extraordinary circumstances, we will not consider arguments raised for the first time on appeal.") (citation omitted); *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721 (10th Cir. 1993) (and cases cited therein) ("We have therefore repeatedly stated that a party may not lose in the district court on one theory of the case, and then prevail on appeal on a different theory.").

[22] *Aiello v. Providian Fin. Corp. (In re Aiello)*, 231 B.R. 684, 689 (Bankr. N.D. Ill. 1999) (citing *In re Archer*, 853 F.2d 497, 499-500 (6th Cir. 1988), *In re Sumpter*, 171 B.R. 835, 844 (Bankr. N.D. Ill. 1994), and *In re Washington*, 172 B.R. 415, 426-27 (Bankr. S.D. Ga. 1994)), *aff'd*, 257 B.R. 245 (N.D. Ill. 2000), *aff'd*, 239 F.3d 876 (7th Cir. 2001)).

[23] *Lord v. Carragher (In re Lord)*, 270 B.R. 787, 794 (Bankr. M.D. Ga. 1998) (and cases cited therein).

[24] *In re Jackson*, 251 B.R. 597, 602 (Bankr. D. Utah 2000) (quoting *United States v. Ketelsen*, 880 F.2d 990, 993 (8th Cir. 1989)).

So that there be no misunderstanding, we do not purport to limit the scope of the hearing to be held upon remand. The bankruptcy court is free to consider those legal and factual issues that it deems appropriate.

Having found that the Sanctions Order is not properly supported by the evidence, we need reach none of the substantive issues raised by Derringer. The only argument made by Derringer that must be dealt with is his request that the cross appeal filed by the Chapels and Manges be stricken. That request is denied for the reasons set forth above.

V. Conclusion

The motion by Derringer to strike the cross appeal of the Chapels and Manges is denied. The Sanctions Order is vacated, and this matter is remanded to the bankruptcy court for further proceedings in accordance with the terms of this Order and Judgment.